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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OKLAHOMA TAX COMMISSION,
Petitioner,

v.

SAC and FOX NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, CHITIMACHA INDIAN TRIBE AND SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION IN SUPPORT OF RESPONDENT

Reid Peyton Chambers*
SONOSKY, CHAMBERS, SACHSE & ENDRESON
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240
Attorneys for Assiniboine and Sioux Tribes of the Fort Peck Reservation and Chitimacha Indian Tribe

Jeannette Wolfley
TRIBAL ATTORNEY'S OFFICE
Shoshone-Bannock Tribes of the Fort Hall Indian Reservation
Post Office Box 306
Fort Hall, Idaho 83203
(208) 238-3820
Attorneys for Shoshone-Bannock Tribes of the Fort Hall Indian Reservation

* Counsel of Record

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INTEREST OF AMICI CURIAE

Amicus Assiniboine and Sioux Tribes of the Fort Peck Reservation has a 2 million acre Reservation located in four counties of northeastern Montana. The Reservation was allotted and opened to settlement pursuant to the Act of May 30, 1908, ch. 237, § 2, 35 Stat. 558. Today,

approximately 5,800 Indians reside on the Reservation, and Indians comprise more than half of the Reservation's population. About half the Reservation's lands are held in trust by the United States for the Tribes or individual Indians; the other lands are owned in fee, mostly by non-Indians.

Amicus Chitimacha Indian Tribe has a 261 acre Reservation consisting entirely of tribal trust lands located in St. Mary's Parish in southern Louisiana. Approximately 290 Indians reside on this Reservation.

Amicus Shoshone-Bannock Tribes reside on the Fort Hall Indian Reservation in southeast Idaho, which is held by the Tribes under the Fort Bridger Treaty, concluded on July 3, 1868, 15 Stat. 673. Pursuant to Article 2 and 4 of the Fort Bridger Treaty, the Shoshone-Bannocks were guaranteed a homeland by the United States for their exclusive use and benefit. The Reservation encompasses approximately 543,932 acres or 870 square miles. Of the 543,932 acres, 96 percent of the land is tribal land or held in trust by the United States for the benefit of the Tribes or its individual members. The remaining four percent is held in fee by individual tribal members and by non-Indians. Today, there are approximately 3,000 Indians residing on the Reservation.

Amici Tribes neither impose their own income and motor vehicle taxes, nor do they license motor vehicles within their Reservations. In 1981, *amicus* Assiniboine and Sioux Tribes brought suit against, and successfully invalidated, application of Montana's new car tax to tribal members who reside on the Reservation but purchased their vehicle outside the Reservation. *Assiniboine and Sioux Tribes v. State of Montana*, 568 F. Supp. 269 (D.Mont. 1983). The Chitimacha Tribe has entered into a tax compact agreement with Louisiana concerning assessment of state sales and use taxes on motor vehicles owned by the Tribe and

its members who reside on the Reservation. The Shoshone-Bannock Tribes have enacted a possessory interest and severance tax which applies to reservation economic activity.

Amici submit this brief because they believe that controlling decisions of this Court prohibit states from imposing their taxes on income earned or automobiles purchased and garaged by Indian residents of federal Indian country. This tax immunity is of great importance to the Tribes' members, many of whom are poor and cannot afford additional state taxes.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. This Court has adopted a *per se* rule barring state taxation of tribes and tribal members on Indian lands except where Congress has clearly authorized such taxes. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *County of Yakima v. Yakima Nation*, 502 U.S. ——, 116 L.Ed.2d 687, 697, 703 (1992). This rule has been held by the Court to prohibit income taxes, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165 (1973), and state excise and personal property taxes on motor vehicles. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980).

2. The *per se* rule bars state taxation of Indians in "Indian country," even if the Indian lands on which such Indians reside, earn income or use and garage their motor vehicles are not within a formal "reservation." This Court very recently expressly so held in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. ——, 112 L.Ed.2d 1112, 1121 (1991). Indian country has been defined by Congress to include (a) "all

lands within the limits of any Indian reservation," (b) "all dependent Indian communities," *and* (c) "all Indian allotments." Act of June 25, 1948, ch. 645, § 1, 62 Stat. 757, 18 U.S.C. § 1151. There is no merit to the suggestion of the United States that allotments it holds in trust for Sac and Fox tribal members are not fully shielded from state taxation under the *per se* rule. Even if such allotments are on a diminished reservation, as the United States contends, this Court has already stated in its unanimous decision in *Solem v. Bartlett*, 465 U.S. 463, 467 n.8 (1984), that "federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. *See* 18 U.S.C. § 1151(c)." *Accord: Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 n.48 (1977).

3. Applying the principle that Indian country, rather than reservation, status controls, it is clear that a state cannot tax income earned in Indian country by an Indian who also resides in Indian country. *McClanahan, supra*, at 165, 180-181. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), does not hold otherwise, because the state taxes permitted in that case had been specifically authorized by Congress.

Similarly, this Court's decisions in *Moe* and *Colville* preclude state excise or property taxes on a vehicle used and garaged by an Indian in Indian country. This rule was first applied by the Court to invalidate state personal property taxes on horses, cattle and wagons used by Indians on their allotments on the diminished Sisseton Reservation. *United States v. Rickert*, 188 U.S. 432 (1903). It continues in force to bar the present taxes which, like the ones in *Colville* and *Moe*, are measured by the full value of the property irrespective of its location and use in Indian country. There is no merit to Petitioner's contention that the State should be allowed to tax because it provides services to Indians and constructs

and maintains roads used by Indians. Precisely this argument was rejected in *Moe*, *supra*, at 476, and the *per se* rule has very recently been held by the Court to preclude any such balancing of interests in Indian tax cases. *Yakima*, *supra*, at 703; *Cabazon*, *supra*, at 215, n.17.

ARGUMENT

I. INTRODUCTORY STATEMENT: THIS COURT'S *"PER SE"* RULE BARRING STATE TAXATION OF INDIANS

"In the special area of state taxation of tribes and tribal members" this Court has adopted a "per se" rule under which taxation of Indians residing on Indian lands is permissible "only when Congress has made its intention [to authorize such taxes] . . . unmistakably clear." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (hereafter "*Cabazon*") (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This rule is as old as the Court's first Indian tax cases in which the Court held that states have no power to tax lands which had been allotted to individual Indians pursuant to a treaty. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) (Since "the tribal organization of the Shawnees is preserved intact . . . they enjoy the privilege of total immunity from state taxation." *Id.* at 755-756). *See also The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). It is as new as this Court's most recent Indian decision last Term in *County of Yakima v. Yakima Nation*, 502 U.S. ——, 116 L.Ed.2d 687 (1992) (hereafter "*Yakima*"), expressly reaffirming this *per se* rule. *Id.* at 697, 703.[1]

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[1] The underpinnings of this *per se* rule are federal recognition of the inherent sovereignty of Indian tribes, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and protection of tribes from governmental regulation by the states so that tribes can remain "a separate people with the power of regulating their internal and social relations," *United States v. Kagama*, 118 U.S. 375, 382 (1886), with the power to "make their own laws and be ruled by them." *Williams*

Recent and unanimous decisions by the Court have barred imposition of the very types of taxes involved in this case—state income taxes, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165 (1973) (hereafter "*McClanahan*"), and state excise and personal property taxes on motor vehicles. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976) (hereafter "*Moe*"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980) (hereafter "*Colville*") (unanimous on this point).

II. STATE TAXES CANNOT APPLY TO INDIAN COUNTRY, EVEN OUTSIDE A RESERVATION

Petitioner does not seek to avoid the *per se* rule by contending that any Act of Congress confers upon it the taxing authority it seeks. Rather, Petitioner argues that the *per se* rule only applies to Indians on a "reservation," and it then argues that the Sac and Fox Reservation was disestablished by an 1891 Act of Congress.[2]

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v. Lee, 358 U.S. 217, 220 (1959). Thus, as the Court explained in *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 686-687 (1965), "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." In sum, as the Court concluded in *Rice v. Olson*, 324 U.S. 786, 789 (1945), "the policy of leaving Indians free from state jurisdiction and control is rooted deeply in the Nation's history."

The *per se* rule against state taxation also furthers modern congressional policies to produce tribal self-determination and economic self-sufficiency, *e.g.*, *Cabazon*, 480 U.S., *supra*, at 219 ("[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development' ") (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

[2] Petitioner admits that both the district court and court of appeals "refused to address this issue" of reservation existence, so

It is true that most cases establishing the *per se* rule against state taxation of Indians did refer to Indians residing on a reservation, but that is only because those Indians clearly had a reservation. For example, in *McClanahan*, the Court held that a state income tax cannot be lawfully "applied to reservation Indians with income derived wholly from reservation sources." 411 U.S., *supra*, at 165. By contrast, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (hereafter "*Mescalero*")—

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there is no detailed historical record before this Court about how the Sac and Fox Reservation was allotted and opened to non-Indian settlement. Petitioner's Brief (hereafter "Pet. Br."), p. 6. This Court has often recognized that the continued existence of an Indian reservation depends on the language of the relevant acts of Congress, their legislative history and all circumstances surrounding their passage, including the negotiations with the affected tribe or tribes. *E.g.*, *Solem v. Bartlett*, 465 U.S. 463, 467, 472 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587 (1977). Similarly, the Court has observed that the extent to which a particular tribe's sovereignty has been altered, divested, diminished or supplanted with state jurisdiction requires "a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-856 (1985).

If this Court should conclude that the existence of the Sac and Fox Reservation is critical to deciding this case, and *Amici* submit it is not, the case should be remanded to the district court to develop a full record on that issue. *Amicus* United States agrees that "[t]he Court might choose to remand for resolution of that issue before addressing the remaining issues in the case," United States' *Amicus* Brief (hereafter "U.S. Br."), p. 9, but alternatively contends that "if the Court chooses to resolve the diminishment issue," it should hold that the Reservation has been diminished. *Ibid.* The United States relies on language in *Solem v. Bartlett*, 465 U.S. 463, 470-471 (1984), that a statute containing language of cession and unconditional promises by Congress to compensate a tribe for land ceded creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." U.S. Br., pp. 10-15. However, a tribe should not be deprived of its reservation without at least the opportunity to develop a record to "surmount" this presumption—if, indeed, the Court concludes that the issue of reservation status is relevant.

decided contemporaneously with *McClanahan*—permitted a state to tax the gross receipts of a tribal ski resort operated on lands the Tribe had leased from the United States Forest Service bordering but "outside the boundaries of the Tribe's reservation." *Id.* at 146. The leased land in *Mescalero* was not held in trust for Indians and was not "Indian country" as defined by 18 U.S.C. § 1151.

Amici submit, however, that the courts below correctly determined that reservation status of the lands in question is irrelevant to determination of this case, because the Sac and Fox lands are held in trust for them by the United States and are Indian country. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. ——, 112 L.Ed.2d 1112, 1121 (1991) (hereafter "*Potawatomi*"), this Court rejected this same petitioner's identical argument: that a "tribal convenience store should be held subject to State tax laws because it does not operate on a formally designated 'reservation,' but on land held in trust for the Potawatomis." *Ibid.* The Court concluded that:

> Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation". Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.*, at 648-649; *see also United States v. McGowan*, 302 U.S. 535, 539 (1938).

Ibid.

Potawatomi teaches that tribes and Indians are exempt from state taxation involving activities on Indian trust lands irrespective of whether those lands remain part of a formal reservation. The question is not reservation

status. As the Court held more than a century ago in its first Indian tax decision, it is whether the Indians and the Indian lands on which their activities take place are protected by treaties and laws of Congress:

> As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1867).

Petitioner agrees that: (1) "the Sac and Fox Nation is a federally recognized Indian tribe . . . organized pursuant to the Oklahoma Indian Welfare Act . . ." Pet. Br., p. 2;[3] (2) the Indian employees in question work at "tribal headquarters . . . on a quarter section (160 acres) . . . held in trust by the United States Government for the benefit of the Tribe" *ibid*; (3) this "tribal trust land constitutes Indian country . . . and is within the jurisdiction of the tribal government" *ibid*; and (4) the United States holds various "other tracts of land in trust for the Tribe and its members," totalling about 15,000 acres. *Ibid*; U.S. Br., p. 2. Like the lands in *Potawatomi* and unlike those in *Mescalero*, Sac and Fox tribal and allotted trust lands are Indian country as defined by Congress in a 1948 statute:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b)

[3] No party or *amicus* challenges the conclusion of the court of appeals that "the Sac and Fox Tribe, like the Navajo in *McClanahan* and the Salish and Kootenai in *Moe*, plainly has not abandoned its tribal organization." *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1429, n.4 (10th Cir. 1992). This is, therefore, not a situation where state taxing authority might be permitted because the Indians living on these allotments "do not possess the usual accoutrements of tribal self government," *McClanahan, supra*, at 167.

> all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, *and* (c) *all Indian allotments, the Indian titles to which have not been extinguished*, including rights-of-way running through the same.

Act of June 25, 1948, ch. 645, § 1, 62 Stat. 757, 18 U.S.C. § 1151 (emphasis added).

In this 1948 Indian country statute, Congress set the extent of federal preemption of state law, and thus, in the special area of taxation, the scope of the *per se* rule. The United States as *amicus curiae* argues that an Indian is exempt from state taxation only on Indian reservation lands—§ 1151(a)—but not necessarily on other Indian country lands—such as trust allotments located on a disestablished reservation—although these are also declared to be Indian country in § 1151(c). U.S. Br., pp. 16-20. But there is no basis for concluding that Congress intended such a difference. Indeed, contrary to the United States' position, this Court has already concluded that:

> *Regardless of whether the original reservation was diminished*, federal and tribal courts have *exclusive* jurisdiction over those portions of the opened lands that were and have remained Indian allotments. *See* 18 U.S.C. § 1151(c).

Solem v. Bartlett, 465 U.S. 463, 467 n.8 (1984) (hereafter "*Bartlett*") (emphasis added).[4] Similarly, in *Rose-*

[4] It would be curious indeed if the law were otherwise. Under the United States' argument, an Indian on fee lands owned by others within an undiminished reservation would be under exclusive federal and tribal jurisdiction, but an Indian on his or her own trust allotment on a diminished reservation could be subject to state law.

Although Section 1151 appears in the federal criminal code and "is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of federal and tribal civil jurisdiction." *DeCoteau v. District County*

bud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n.48 (1977) (hereafter "*Rosebud*"), the Court stated that "to the extent that members of the Rosebud tribe are living on allotted land outside of the Reservation, they, too, are on 'Indian country' within the definition of 18 U.S.C. § 1151 and hence subject to federal provisions and protections."

The United States would complicate what is really a simple determination—whether an event occurs in Indian country—by proposing that an Indian residing on an allotment on a diminished reservation is exempt from state taxation *only* if there is also a "reservation community." U.S. Br., pp. 17-18. Apart from ignoring this Court's statements in *Potawatomi* and *Bartlett*, *supra*, the United States would collapse the three categories of Indian country contained in Section 1151—(1) reservation lands, § 1151(a), (2) "dependent Indian communities," § 1151(b), and (3) "all Indian allotments," § 1151(c)—into two. That would rewrite Section 1151 to define Indian country as (a) "all land within the limits of any Indian reservation," or (b) "all Indian allotments" that are *also* within "dependent Indian communities." Congress could of course have done this, but it did not.

Thus, under Section 1151 an Indian is exempt from state authority on an allotment whether or not it is within a reservation, 18 U.S.C. § 1151(c), *Bartlett*, *supra; Rosebud*, *supra*. In addition, an Indian is also subject to exclusive federal and tribal authority and exempt from state authority in a "dependent Indian community," even if that community is outside a reservation and not located on any Indian allotments. *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980).

Court, 420 U.S. 425, 427, n.2 (1975); *see also Cabazon*, *supra*, at 207, n.5; *McClanahan*, *supra*, at 181 ("state is totally lacking in jurisdiction over both the people and the lands it seeks to tax.").

III. STATES CANNOT APPLY INCOME OR MOTOR VEHICLE EXCISE OR PROPERTY TAXES TO INDIANS WHO RESIDE IN INDIAN COUNTRY, AND EARN THEIR INCOME OR GARAGE THEIR VEHICLES IN INDIAN COUNTRY

Once it is recognized that the "Indian country," rather than reservation, status of the lands controls, resolution of this case should proceed by straightforward application of the *per se* rule and this Court's prior recent decisions.

A. Income Taxes

McClanahan precludes Oklahoma from imposing a tax on income earned in Indian country by an Indian who also resides in Indian country.[5] Petitioner's contention that *McClanahan's* bar to income taxation only applies to a solid tract of reservation land like "the 7.6 million acre Navajo Reservation" is clearly wrong. Pet. Br., p. 14. This Court's *Moe* decision barring state taxation of motor vehicles owned by Indians[6] involved a reservation which had been allotted and opened to settlement by non-Indians, where slightly over half of its 1.25 million acres is now owned in fee and where tribal members comprised "19% of the total reservation population." 425 U.S., *supra*, at 466.[7] *Yakima* and *Colville* also involved

[5] Where an Indian tribal employee resides outside of Indian country, *Amici* believe whether the state may validly apply its tax (so long as it also taxes other state residents who earn income in other jurisdictions) depends on whether the state tax interferes with the tribal employer's administration of its governmental affairs. Compare U.S. Br., pp. 20-23.

[6] In *Moe*, the Indian plaintiffs had originally challenged Montana's personal income tax. Shortly after *McClanahan*, "the State stipulated that *McClanahan* barred its taxing jurisdiction in this respect." 425 U.S., *supra*, at 469, n.8.

[7] As this Court observed in *Moe*, *supra*, at 466-467, the district court in that case found that:

> The Flathead Reservation is a well-developed agricultural area with farms, ranches and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.
>
> As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians. The only schools on the Reservation are those operated by school districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction.

[8] Some observations the Court made about Oklahoma tribes in 1943 are no longer completely accurate today, five decades later. The policy of Congress since the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.*, has been to strengthen tribal self-government in Oklahoma. Implementation of this Act and of

reservations that had been allotted and opened to non-Indian settlers. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 415, 422 (1989); *Seymour v. Superintendent*, 368 U.S. 351, 354-358 (1962). As noted, the earliest decision of this Court precluding the state taxation of Indains involved a reservation that had been subject to a treaty surrendering some lands for sale to non-Indians and allotting others to tribal members. *The Kansas Indians*, 72 U.S. (5 Wall.), *supra*, at 757.

Petitioner also relies upon *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), as somehow exempting Oklahoma tribes from the *per se* rule. Pet. Br. pp. 13-14, 20. While this Court's closely divided decision in *Oklahoma Tax Comm'n* did uphold application of state estate taxes to some restricted funds held by the United States for the benefit of members of the Five Civilized Tribes, that state taxing authority *was pursuant to a specific statutory grant.* Act of January 27, 1933, 47 Stat. 777, ch. 23; 319 U.S. *supra* at 604-606.[8]

B. Motor Vehicle Excise and Property Taxes

As noted above, both *Moe* and *Colville* involve reservations which, like the Sac and Fox, had been allotted and opened to non-Indian settlement. So long as a Sac and Fox Indian resides in Indian country (i.e., on a trust or restricted allotment) and uses and garages his or her car there, *Moe* and *Colville* teach that a state may not impose a tax on that vehicle, whether it is denominated a property or excise tax.[9]

This Court first invalidated state taxes on personal property used by Indian allottees on their lands in *United States v. Rickert*, 188 U.S. 432 (1903) (hereafter "*Rickert*"). *Rickert* involved trust allotments on the "former Sisseton Indian Reservation" in South Dakota, *id.* at 433; *see DeCoteau v. District County Court*, 420 U.S. 425 (1975). This Court held that state taxation of improvements or personal property used on these trust allotments would frustrate the policy of Congress in the Allotment Acts. *Rickert*, *supra*, at 442-443.

The personal property held exempt from state taxes in *Rickert*, appropriate to the "horse and buggy" days of

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modern federal Indian policies of tribal self-determination and economic self-sufficiency, such as contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, have revitalized Oklahoma tribal governments, which today administer millions of dollars of federal programs and services annually, run schools and have active and functioning tribal courts. *E.g., Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). The State concedes that the Sac and Fox are today a functioning tribal government, Pet. Br., p. 2, as are other Oklahoma tribes such as the Potawatomi—or else they would not have been determined by this Court to possess tribal sovereign immunity in *Potawatomi*, *supra*, p. 8.

[9] *Amici* takes no position on whether *Moe* permits a state to impose a nondiscriminatory registration fee, such as Oklahoma's flat $15 fee in this case, on Indians residing in Indian country who register their vehicles with the State. *See Moe*, 425 U.S., *supra*, at 469 and n.9.

1903, was horses, cattle and wagons, *id.* at 433, 443, not motor vehicles. Similar taxes on motor vehicles did not come before the Court until 1976, when a unanimous Court invalidated a state "personal property tax which was . . . a condition precedent for lawful registration of the vehicle . . . imposed on reservation Indians." *Moe*, *supra*, at 469. The Court in *Moe* specifically rejected the State's arguments that it should be allowed to tax Indians residing on reservations because the reservation had been opened to non-Indian settlement and the Indians had received allotments, because Indians "benefitted from expenditures of state revenues for education, welfare, and other services . . . [and] had the right to vote and to hold local and state office . . . ," or because "the Indian and non-Indian residents within the reservation were substantially integrated as a business and social community." *Id.* at 476.

The Court similarly held that states may not impose their full vehicle excise taxes on Indians when the vehicles are used both on and off an area protected from state taxation by federal law. *Colville*, *supra* at 162-164. In *Colville*, the Court observed that the taxes were "[e]ach denominated an excise tax for the 'privilege' of using the covered vehicle in the state, each is assessed annually at a certain percentage of fair market value, and each is sought to be imposed on vehicles . . . used both on and off the reservation." *Id.* at 162. The Court in *Colville* used *Moe* as its "departure point," explaining that in *Moe* "the tax was assessed annually as a percentage of market value of the vehicles in question." *Id.* at 163. It rejected the State's argument that "the taxable event is the use *within the State* of the vehicle in question," *ibid.* (emphasis in original), and held that "more than mere nomenclature" was required to avoid the bar of *Moe*. *Id.* at 164.

The teaching of these cases is that if the vehicle is garaged and used within Indian country, it is insulated

from the state tax, whether labeled a personal property or excise tax. As in *Rickert* and *Moe*, the place of use of the personal property, not its place of purchase, controls. Doubtless, at least some of the horses, cattle and wagons in *Rickert* and motor vehicles in *Moe* and *Colville* were purchased outside Indian country. Yet all three cases invalidated both property and excise taxes measured by the full value of the property where that property was used in Indian country.

By contrast, the Court in *Colville* observed that a state "may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles . . . tailored to the amount of actual off-reservation use. . . ." 447 U.S., *supra*, at 163. But like the states involved in *Moe* and *Colville*, Oklahoma here seeks to impose *its entire* annual property tax and excise tax on vehicles owned by an Indian residing in Indian country, measured by the value of the vehicle,[10] irrespective of where the car is used. It does not seek to apportion the taxes between use of the vehicle inside or outside of Indian country. These are *exactly* the kind of taxes forbidden by the *per se* rule.

Petitioner also contends that its motor vehicle taxes should be sustained because "the state has a greater interest in the revenues than the Tribe" and the Tribe and its members receive "state services because all roads in Oklahoma are constructed and maintained by the State and the Tribe provides none of these services." Pet. Br.,

[10] As the court of appeals below found:

> The State of Oklahoma imposes two motor vehicle taxes. The first is the Vehicle Excise Tax calculated at three and one-half per cent of value and imposed upon transfer of legal ownership. The second tax is the annual registration fee imposed on every vehicle operated upon, over, along, or across any avenue of public access within Oklahoma. This tax is imposed in lieu of a personal property tax on automobiles.

Sac and Fox Nation, 967 F.2d, *supra*, at 1430. This annual registration fee in lieu of a personal property tax is $15, plus 1¼% of the vehicle's value. U.S. Br., p. 3.

pp. 5, 19-21. Precisely this argument was rejected in *Moe*, *supra* at 466-467, 476, and in any event the *per se* rule precludes any such balancing of interests here. As the Court stated in *Cabazon*:

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

480 U.S., *supra*, at 215, n.17. This holding was very recently reaffirmed in *Yakima*:

> [W]e have traditionally followed "a per se rule" [i]n the special area of state taxation of Indian tribes and tribal members. Though the rule has been most often applied to produce categorical prohibition of state taxation when there had been "no cession of jurisdiction or other federal [legislative permission]," *Mescalero Apache Tribe*, 411 U.S., at 148, we think it also applies to produce categorical allowance of state taxation when it has in fact been authorized by Congress. "Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress." *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S., at 177, (opinion of Rehnquist, J.).

116 L.Ed.2d, *supra*, at 703.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Reid Peyton Chambers*
SONOSKY, CHAMBERS, SACHSE & ENDRESON
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240
Attorneys for Assiniboine and Sioux Tribes of the Fort Peck Reservation and Chitimacha Indian Tribe

Jeannette Wolfley
TRIBAL ATTORNEY'S OFFICE
Shoshone-Bannock Tribes of the Fort Hall Indian Reservation
Post Office Box 306
Fort Hall, Idaho 83203
(208) 238-3820
Attorneys for Shoshone-Bannock Tribes of the Fort Hall Indian Reservation

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* Counsel of Record